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Issue Date: 23 March 2004

CASE NO.: 2003-LHC-464

OWCP NO.: 7-162630

IN THE MATTER OF

RAPHAEL CASSIMERE
Claimant

v.

P&O PORTS LOUISIANA, INC.,
Employer

APPEARANCES:

William Vincent, Jr., Esq.
For Claimant

William C. Cruse, Esq.
For Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (the Act), brought by Raphael Cassimere (Claimant) against P&O Ports Louisiana, Inc. (Employer). The formal hearing was conducted in Metairie, Louisiana on October 14, 2003 and October 31, 2003. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written

arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1b-3, 6-7, and 11-12 and Employer's Exhibits 1-4 and 6-14. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on January 24, 2002
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on January 24, 2002;
5. A Notice of Controversion was filed March 18, 2002 and August 16, 2002;
6. An informal conference was held on August 22, 2002;
7. The average weekly wage at the time of injury is disputed;
8. Temporary total disability and temporary partial disability are disputed;
9. Permanent disability and impairment rating are disputed; and
10. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

1. Causation for injuries other than the left hand;
2. Average Weekly Wage;
3. Nature and Extent of disability to the left hand and back;
4. §7 Medicals and Mileage; and
5. Attorney fees and costs.

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[1] The parties were granted time post hearing to file briefs. This time was extended up to and through January 9, 2004.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Statement of the Evidence
Testimonial and Non-Medical Evidence

Claimant, age 30, testified at the formal hearing. Following Claimant's graduation from high school in 1990, he attended several semesters of college and eventually in 1995 began longshoring work. In 1997, Claimant became a member of the union, attaining an A-3 status as a longshoreman. Claimant worked without incident until June 1999 when he injured his back and was restricted from work until July of 2001. When Claimant returned to work it was without restrictions. From July 6, 2001 through January 24, 2002, Claimant did all types of longshoring work, including working in the hold of barges, throwing sacks, occasionally working automated cargo, and sometimes working on the ground (TR 78-79). In 2001, he did not receive vacation/holiday pay because he had not worked a full contract year due to his prior back injury.

On January 24, 2002, Claimant was working on a barge during the night shift. He was unloading bundled pipe from a ship to a barge. It had been raining heavily and as Claimant attempted to get off the barge while tying the vessel, the hook of the crane dropped low and hooked an aluminum ladder, trapping Claimant between the ladder and the barge. Claimant explained that he injured his back when the two forces collided. When the ladder crushed his hand against the lip of the barge his whole body jerked backwards and then he fell (TR 90). After climbing off the barge, Claimant was taken to Marine Medical, who then referred him to Dr. Harold Stokes, an orthopedic hand specialist.[3] Claimant testified that he did not remember giving a history of the accident to personnel at Marine Medical. The intensity of his pain as well as the narcotic pain medication and the ensuing nausea prevented him from having a clear recollection of the events.

Dr. Stokes performed surgery and treated Claimant throughout his recovery from hand surgery. In March 2002, Dr. Stokes referred Claimant to a pain specialist suspecting Claimant may have developed Reflex Sympathetic Dystrophy (RSD). From March 2002 and continuing, Dr. Shawa treated Claimant for the pain which developed as a result of his hand injury.

Claimant saw Dr. Bourgeois on 4 separate occasions for treatment of his back. Claimant had complained of back pain to Dr. Stokes, who referred him to Dr. Bourgeois. The MRI which was recommended by Dr. Bourgeois, was not

[3] Employer's Exhibit 7 confirms that on January 30, 2002, Claimant complained to Dr. Stokes of "back pain, arm pain, neck pain and numbness in his feet." Claimant was referred to Dr. Bourgeois for his back complaints. (TR 94-95).

authorized as a compensable medical expense by Employer and was therefore paid for by Claimant's attorney (TR 103). Claimant explained that his back continued to cause him trouble; however, since an intervening auto accident in September 2003, it had significantly worsened. Claimant testified that he experienced pain down his right leg as well as aching and burning sensation and numbness and weakness. Before the auto accident Claimant stated he had trouble walking and used a pillow while sitting for added comfort. He also had trouble bending and stooping.

In August 2002, following a release to work by Drs. Stokes and Shawa, Claimant was informed that he had been offered a light duty position with Employer. When Claimant reported to the gate at Employer's facility he was told he would be transported via the passenger van to his work site. Claimant stated that he approached the van and noted that there were no hooks or running board to help him get into the van. He tried to get in, having laid his hand flat on the side of the van, but felt a pain in his back and was attempting to hold a pillow around his left arm (TR 216). He explained that he wanted to be otherwise accommodated so that he would not have to ride in the van (TR 219). He said it was too high for him to put his leg in the van (TR 216). Claimant explained that in spite of his willingness to do the part time light duty work, he was unable to get into the van, and therefore, unable to get to his work site. He asked that he be allowed to drive his own vehicle, a SUV, to the site, however, when informed that it would not be permitted he left Employer's facility.

Shortly thereafter, Claimant was provided with information, garnered by Employer's vocational rehabilitation specialist, Nancy Favaloro, of other jobs for which Claimant was physically and otherwise qualified. Using the descriptions provided, after having been informed that no further specifics would be forthcoming, Claimant began to look for work. Claimant explained that he did not feel physically able to work, however, he pursued employment because he had been informed that his compensation would be reduced in that he was no longer considered *totally* disabled.

Claimant applied for a variety of jobs including cashier positions with various garages in the French Quarter section of New Orleans, Louisiana, as well as telephone operator positions and bridge monitoring positions. At the formal hearing Claimant enumerated a list of approximately 30 jobs for which he said he inquired or applied between June and October 2003 (TR 120-142).[4] Claimant

[4] Claimant's job search was temporarily interrupted by the car accident on September 22, 2003.

noted that he did not bring the pillow; he typically used to protect his arm from sensation, to the job interviews or inquiries. He noted that he had some trouble driving due to his drowsiness and inability to use his non-dominant left hand. Also affecting Claimant's employability are two felony convictions for narcotics (TR 155). In spite of Claimant's efforts, he maintains he received no job offers.

Ms. Chris Kelly

Ms. Kelly testified at the formal hearing. She was a claims administrator for Employer at the time of Claimant's injury. Ms. Kelly testified that Claimant was offered light duty employment beginning August 12, 2002, and identified Employer's Exhibit 6 as the written offer which had been sent to Claimant. Ms. Kelly explained that when Claimant appeared for the job, which would have paid $400/week, he refused to ride the shuttle bus, and insisted on driving his own sports utility vehicle to the work site. After the security guard, Mr. Adams, refused to let Claimant drive his own vehicle onto the wharf, Claimant left. When questioned on cross-examination, Ms. Kelly agreed that no special accommodation had been made for Claimant's vehicle (TR 298).

Steve Arceneaux

Steve Arceneaux testified at the formal hearing. At the time of the formal hearing, Mr. Arceneaux had been employed by Employer for almost 14 years. He handled all claims against Employer for the New Orleans area. He was familiar with the light duty program, and explained that following the temporary termination of the program on December 11, 2002, pending a union election, the light duty program was unilaterally reinstated in January 2003(TR 243). He commented that in 2002 there was a memorandum of understanding attached to the collective bargaining agreement providing that some jobs could be light duty because they were not covered under the collective bargaining agreement (TR 230).[5] Mr. Arceneaux stated that he was the one who told Ms. Favaloro not to divulge the names of prospective employers, according to *Turner v. New Orleans Stevedores* (TR 247).

Mr. Arceneaux confirmed that only Employer's administrative employees park within the gates at the work site. He further explained that he felt Claimant was going out of his way to sabotage the light duty position he had been offered, and had already determined that he was not going to perform the job (TR 232).

[5] Some of the jobs considered light duty are re-painting forklift machines, inventory in the gear yard parts room, and filing with Mr. Williams doing safety inspections etc. (TR 229).

Following the incident at the front gate, Mr. Arceneaux spoke about the situation with Ms. Kelly at length.

John David Morgan

John David Morgan, vice-president for Employer, testified at the formal hearing. He was familiar with the collective bargaining agreement and business done by Employer in the Port of New Orleans. As the Port vice-president, Mr. Morgan is responsible for all aspects of stevedoring terminal operations, including gathering information on the number of vessels and tonnage coming into the port. The Port of New Orleans keeps comparable records. Mr. Morgan testified as to his general knowledge of the business trends in the Port. From 1993 through 1998 the general cargo was on a slight upward motion, and in 1998 it hit its' peak, meaning it had the most general cargo tonnage. After 1998 there was a residual high in 1999, and then the general cargo tonnage from 1999 through the present has had a downward spiral (TR 327). Container vessel tonnage over the last ten years, according to Mr. Morgan, had been stagnant, neither a major increase nor decrease.

As to the increase of business with the cruise vessels, Mr. Morgan testified that one cruise line had committed to the ILA, however, the other two cruise lines had not contracted service as yet. The standard rate for a porter/baggage handler for the cruise lines is $17.50 (TR 328). As of October 1, 2001, longshoremen earned $26 per hour, straight time (TR 342). Mr. Morgan remarked that winning the contracts of the cruise lines, even with the seasonal nature of 2 of the cruise lines, would be additional business for the port (TR 339). Mr. Morgan testified as to the classifications of Longshoremen, commenting that there were three main categories for registered longshoremen, A1, A2, and A3, and then there is the B class and finally the casual class. A1 would be the class with the highest seniority having worked longest at the port, and by contrast casual workers are newly hired and therefore do not have the benefits of seniority. Classification is important because it determines the method by which workers are hired (TR 322).

Mr. Morgan testified that at the time of the formal hearing there was a light duty program as between Employer and the ILA (TR 329). Mr. Morgan explained that there had been a written agreement which terminated the light duty program in December of 2002. However, shortly thereafter there was another light duty program instituted verbally (TR 330, 338). There are not many longshoremen in the program; however, Mr. Morgan commented that there had been in the past. All those individuals working light duty earned $10/hr. for 40 hours per week, doing jobs like painting, safety inspections, and filing (TR 331).

Mr. Morgan testified that longshoremen are not allowed to drive their vehicles onto the wharf. He explained that it is both Employer's rule as well as U.S. Coast Guard procedure (TR 333). He explained that the reasons were primarily safety and liability, because only properly identified and insured vehicles can enter the wharf to park in designated areas according to Coast Guard rules (TR 334).[6]

Nancy Favaloro

Nancy Favaloro, a vocational rehabilitation expert, testified at the formal hearing (TR 346). Her report is Employer's Exhibit 10. She stated there were a variety of jobs available which Claimant was capable of performing. She believed Claimant was suitable for employment paying from $6.00 to $8.00 per hour. Dr. Stokes approved the jobs Ms. Favaloro found, as did Dr. Katz. Ms. Favaloro explained that she was hired by Employer to determine Claimant's vocational rehabilitative potential. Ms. Favaloro was not asked to assist Claimant in returning to employment.

Ms. Favaloro reviewed Claimant's medical file and made an appointment to see Claimant on May 9, 2003, for a vocational interview. Claimant and Ms Favaloro reviewed Claimant's background information, including his education and employment history, as well as his current medical condition. The vocational testing that Ms. Favaloro administered was considered incomplete. Claimant explained that he could have performed better on the testing, however, he was excessively sleepy. Ms. Favaloro determined that Claimant had an injury to his left (non-dominant) hand and did not have full use of his arm. Claimant had performed semi-skilled work in the past, including operating equipment and making decisions. His general intelligence was average, and based on the information, she looked for entry-level jobs that would not require any specific vocational training and where the jobs tasks would not require full use of Claimant's left upper extremity (TR 351).[7]

Ms. Favaloro noted on page 4 and 5 of her report, and again at the formal hearing, that Claimant would be suited for the positions of digital operator, requiring only that Claimant sit at a desk scanning documents, using his right hand

[6] Even customers and vendors to the Safety Manager's office must register their vehicles before they can proceed to the designated parking areas, in addition to signing a "hold harmless agreement." In effect, Employer can make exceptions to the general rule, allowing people to drive closer to where the offices are located, but no exceptions has ever been made for longshoremen (TR 337-338, 344).

[7] Ms. Favaloro was also aware that Claimant had a felony conviction for narcotics, and therefore, searched for available positions accordingly.

to deal with the staples and folds of the documents. Claimant was also capable of performing the garage cashier positions in a parking lot, specifically Harrah's. The telephone operator job required that Claimant be able to answer a phone and transfer the caller to a given department. Claimant would wear a headset and could use his right arm. The job paid $7.25/hr (TR 355). The last job identified by Ms. Favaloro was a bridge monitor job with the Causeway Police. Claimant would monitor traffic, report suspected drunk drivers to the police, as well as periodically check a computer for an error message. Claimant's computer skills were sufficient for this position. The bridge monitor position paid $7.27/hr. Each company was advised that Claimant would not have the use of his non-dominant left hand.

Ms. Favaloro felt Claimant was employable and that the wages he could earn would be between $6.50 and $8.00/hr (p.357). Ms. Favaloro also sent descriptions of the jobs to Dr. Stokes who agreed, on June 6, 2003, that Claimant was capable of performing the jobs listed. Dr. Katz also approved the jobs listed as of June 3, 2003. Dr. Shawa was not sent the list of jobs (TR 368).[8]

The date of Ms. Favaloro's report was May 21, 2003. Ms. Favaloro authored an additional report dated June 13, 2003. Claimant contacted Ms. Favaloro's office in August 2003, and was told to contact his attorney. Ms. Favaloro explained that if she had been hired to perform job placement services she may have given him the specific locations of the jobs, but as she was hired for the limited purpose of vocational rehabilitation evaluation, she was not at liberty to release the specifics of the jobs available. Ms. Favaloro said that in her experience these types of jobs are routinely available (TR 362). After some preliminary research, Ms. Favaloro testified that cashier positions have annual openings in the greater New Orleans area of 1,030, parking lot attendants of 20, and switchboard operators of 30. Ms. Favaloro agreed that a person's presentation is a vital part of obtaining a job (TR 363).

On cross-examination, Ms. Favaloro acknowledged that Claimant was excessively sleepy during his interview, and that he was taking at least three medications for his pain. She agreed that there are few jobs which a sleepy prospective employee will be hired to do, or if he could get the job but fell asleep while performing the job he may be fired. In answer to Claimant's effort to apply for 75 different jobs, Ms. Favaloro answered that presentation was important as well as job availability. Ms. Favaloro stated that if Claimant seemed excessively sleepy or mentioned that he was unable to work but his attorney had asked him to

[8] However, during his first deposition Dr. Shawa acknowledged the jobs to be suitable.

look for jobs, then she responded that she was not surprised he was not hired. In her experience it takes 4-5 months before an individual finds a job (TR 374).

Albert Morella

Albert Morella testified at the formal hearing (TR 382). Mr. Morella testified as the vice-president of the ILA local 3000 union. Specifically, Mr. Morella was questioned regarding the light duty program offered by Employer (TR 383). He explained that the light duty program was deemed illegal because the president of the union had approved it without the necessary co-signatures. Furthermore, he stated that the U.S. Department of Labor disapproved of the program because it conflicted with the contract definition of longshore work. Mr. Morella explained that the light duty program was cancelled when the membership found out about it. Mr. Morella stated that there had been no light duty program installed since it was disbanded in December of 2002. He added that he was the only one who opposed the reinstitution of a light duty program (TR 384).

Mark H. Ellis

Mark H. Ellis is the secretary/treasurer for General Longshoreworkers ILA local 3000. He testified at the formal hearing. Mr. Ellis worked for the union for 22 years, and before that worked as a longshoreman for 9 years. Mr. Ellis testified about the wages and work availability for longshoreman at the time Claimant was injured, as well as in the preceding years.

Mr. Ellis explained that in order to qualify for vacation pay a worker must work 500 hours, and to qualify for holiday pay a worker must work 700 hours. The royalty payment in 2001 was $6,523.00 dollars, if the individual worked 700 hours and was a registered member of the workforce. Vacation pay, if one qualifies, is $90 for every 100 hours worked, and holiday pay fluctuates between 56¢-65¢/hour worked. According to the documents reviewed by this witness, Claimant earned $2,297.31 in vacation and holiday benefits in 1998, which is approximately the same amount he would have earned in 2001 (TR 57).

In regards to the general work situation on the waterfront, Mr. Ellis opined that it was starting to look a lot brighter (TR 63). The cruise lines contracted with the Port, and are expected to employ more A3 workers, and for the first time in 2 years B workers have been promoted. Opportunities for longshoremen continue to be pretty stable from 1998 through the present (TR 71), and Mr. Ellis added that anybody in the registered workforce would be fine, and could expect to do well financially over the course of 10-15 years (TR 72). Mr. Ellis said that Claimant

was "on course" to be an A2. Mr. Ellis explained that according to the union there was no light duty program though Employer (TR 73).

David Joseph Adams

David Joseph Adams testified at the formal hearing. He is an accounts manager for U.S. Security, which had a contract with Employer. Mr. Adams worked on the Nashville Wharf to handle and oversee all security issues. Mr. Adams attested that he was present when Claimant reported for his light duty position. He explained that Claimant approached the passenger van which would transport him to the light duty work site and proclaimed that he could not get in the van. Mr. Adams testified that Claimant spoke with Christine Kelly and then he returned to the guard shack and spoke with Mr. Adams. Mr. Adams testified that Claimant was aggravated because he was not permitted to drive his personal vehicle to the light duty job site. After becoming increasingly "agitated", Claimant returned to his vehicle, got into the vehicle without problem or assistance, and departed (TR 315).

Mr. Adams testified that if an official of Employer had told him to allow Claimant to proceed in his own vehicle; he would have allowed Claimant to go forward. In other words, as long as it was approved by Employer' management, visitors or other individuals could park in the area next to the safety office (TR 316).

Edward Ryan

Edward Ryan testified at the formal hearing as a vocational rehabilitation counselor (TR 248). Mr. Ryan reviewed the medical records as well as Ms. Favaloro's report. He also met with Claimant regarding jobs on August 5, 2003 and August 17, 2003. In spite of Claimant's reluctance to find a job, all the doctors had cleared Claimant to work, and therefore, Claimant went forward in attempting to secure employment (TR 253). Mr. Ryan testified that Claimant's wage earning capacity was between $5.87 (as a parking lot attendant) and $6.24 (as a telephone operator), both of which jobs he felt Claimant was capable of performing (TR 269). Mr. Ryan agreed that Claimant could perform the job as a digital operator, however, he felt Claimant could not perform the job competitively.

Medical Evidence

Claimant's crushed hand was treated by Dr. Stokes, and the resultant RSD was treated by Dr. Shawa. Claimant was referred to Dr. Bourgeois for back complaints, and he was also evaluated by Dr. Katz for his back condition.

Dr. Harold Stokes

Dr. Stokes, an orthopedic hand specialist saw Claimant specifically for the treatment of his left hand (EX 14). On January 30, 2002, Dr. Stokes took a history from Claimant. After a physical examination, Dr. Stokes recommended an open reduction and internal fixation of the fifth metacarpal fracture. Claimant also complained of back pain which he related to his injury. Dr. Stokes recommended Dr. Warren Bourgeois, Claimant's orthopedist of choice, and the referral was made. Dr. Stokes performed hand surgery on Claimant on January 31, 2002.

On February 4, 2002, Claimant complained of burning pain in the dorsum of his hand as well as twitching and numbness in his fingers. Claimant's dressings were removed, and his wound appeared quite satisfactory with no sign of infection. Dr. Stokes noted specifically that he was not treating Claimant's back complaints. Claimant returned February 13, 2002, for removal of his sutures, and was then referred to The Hand Rehab Center for active range of motion and other therapy. He was given Vicodin for the pain.

Claimant returned to Dr. Stokes on, March 6, 2002. Dr. Stokes felt that Claimant had made little progress in the preceding four weeks, and insisted Claimant take a more active role in his therapy, requiring less prompting by therapist. Claimant returned on March 20, 2002, complaining of severe pain in his hand, and was unwilling to move the digits based on pain. While not manifesting all of the symptoms of reflex sympathetic dystrophy (RSD), Dr. Stokes recommended Dr. Crapanzano for further evaluation; instead Claimant was seen by Dr. David Shawa, Dr. Crapazano's colleague.

On April 17, 2002, Dr. Stokes noted that the metacarpal shaft was completely healed. Dr. Stokes recorded the potential benefit of a CPM machine, and anticipated speaking with the therapist about such item. Dr. Stokes scheduled Claimant for another visit in four weeks' time.

On May 15, 2002, Claimant continued being treated through pain management specialist, Dr. Shawa. Claimant had eight stellate ganglion blocks on the left side. Dr. Stokes noted that Dr. Shawa felt Claimant was generally improved. Dr. Stokes said that Claimant's hand was suppler, although it was cool. Dr. Stokes felt that he would continue to monitor Claimant as he stabilized, and according to conversations with Dr. Shawa it was noted that Claimant was not a candidate for a sympathectomy.

On June 12, 2002, Claimant had no swelling of the left hand or findings of reflex sympathetic dystrophy (RSD). Dr. Stokes felt that Claimant was stable as far as the RSD. Claimant indicated at that time that he would be willing to perform light duty work, but there was none available at Employer's facility.

On July 24, 2002, Dr. Stokes noted no major changes in Claimant's condition regarding his upper left extremity. After noting that light duty work had been found for Claimant, Dr. Stokes stated he felt Claimant was capable of copying and filing. Claimant expressed concern that he continued to be treated for back and neck pain, and although he would like to try the light duty assignment, he was concerned that treatment with Dr. Bourgeois may interfere. Dr. Stokes believed that as of July 24, 2002, Claimant had had sufficient hand therapy.

On September 3, 2002, Claimant indicated to Dr. Stokes that he had been asked to do light duty consisting of filing and copying. Dr. Stokes felt that the filing and copying was within Claimant's capabilities. Claimant indicated that he was in substantial pain and unable to work, requesting more treatment with Dr. Shawa. Dr. Stokes stated that Claimant did have restriction of motion secondary to reflex sympathetic dystrophy (RSD), and was therefore an appropriate candidate for pain management under Dr. Shawa.

On May 6, 2003, Dr. Stokes reported that Claimant was being treated by Dr. Shawa; specifically he was being prescribed Catapres, Neurotin, and Avinza. Clinically, Dr. Stokes felt that it would appear Claimant had "burned out" RSD, however, Claimant was experiencing on-going complaints and continued to be treated by Dr. Shawa. Dr. Stokes felt Claimant had reached Maximum Medical Improvement as far as his left hand was concerned, however, he deferred to Dr. Shawa regarding that determination. Dr. Stokes noted the limitation of motion of the digits of the left hand, but did not appreciate any neurological deficit in the left hand. Based on the restriction of motion from the RSD, he assigned the left hand a 40% permanent impairment rating. Dr. Stokes anticipated seeing the patient on an as needed basis.

On June 17, 2003, Dr. Stokes wrote that although Claimant reported having pain in his left hand and wrist, the examination was essentially unchanged from the May 6, 2003 visit, and Dr. Stokes had nothing further to offer from a surgical standpoint (EX 7).

Dr. Shawa

Dr. David Shawa was referred by Dr. Stokes for management of Claimant's pain. He first examined Claimant on March 27, 2002, two months following Claimant's injury. At that time, he noted Claimant's history of injury, remarking that Claimant was a longshoreman who had suffered an injury when a crane hook caught a ladder which trapped his hand between the ladder and the barge. The result was a fracture of the 5th metacarpal and a laceration of the medial aspect of his left middle finger. He was complaining of severe hand pain, rated 8.5 on a ten scale. Claimant described sharp, stabbing, burning, aching, throbbing, and cramping pain in his hand. Claimant also had numbness in the tips of his fingers. Claimant noted that his middle finger was swelling and his hand had become extremely cold, however, the dorsal side of his hand was burning, and he was beginning to feel pain in his elbow as well. Claimant reported increased sweating in his hand.

Dr. Shawa performed a physical examination, noting alodenia[9] that was due to neuropathy. Claimant had lost the crease in his knuckles due to the edema and the temperature of his hand was cool to the touch. Dr. Shawa noted good perfusion in the fingers and no increased sweating at the time of the exam. There was virtually no motion in the proximal and distal interphalangeal joints. Based on the complaints and physical exam, Dr. Shawa diagnosed Claimant with chronic regional pain syndrome, also known as Reflex Sympathetic Dystrophy (RSD).[10] Dr. Shawa recommended Stelegate gamine blocks for the pain, which were approved March 28, 2002.

The pain blocks were administered through the sympathetic nerves in the neck, in this case those that extend to the hand. If the sympathetic nerves are successfully blocked, the blood flow increases and pain is reduced. If the blocks are done in conjunction with physical therapy it is expected that the patient would start seeing progressive improvement. Between March 28, 2002 and May 9, 2002 Dr. Shawa administered 8 blocks on Claimant. With each block there was some decrease in Claimant's symptoms, and Dr. Shawa agreed there was progressive improvement, which was consistent with the regional pain syndrome diagnosis. Additionally, Dr. Shawa administered local anesthetics and steroids at the elbow to

[9] Alodenia is when light touch is perceived as being painful.

[10] Reflex Sympathetic Dystrophy is associated with Type I or II injuries. The sympathetic nervous system is involved and although nobody is sure exactly how the problems arise, the theory is that the there is an abnormal connection between the sympathetic nerves and the sensory nerves, which is called ephactic transmission. The involved extremity remains in a hyper-excitable state that eventually spreads to the central nervous system. Normal neuro-function ceases and a chronic pain state ensues, causing Claimant's symptoms, namely: hypersensitivity to touch, coolness, sweating, loss of joint function, and pain.

treat what he had diagnosed as lateral epicondlyis (CX 11, p. 11). Dr. Shawa explained that sometimes complex regional pain syndrome can begin in the distal extremities, but as it progresses it can involve the more proximal portions of the arm.

By May 6, 2002, Dr. Shawa found that Claimant had improved and he was considering discontinuing the blocks. He explained that Claimant had reached a point of maximum medical improvement. The blocks were performed to help the Claimant participate in physical therapy, and in agreement with Dr. Stokes, Dr. Shawa explained that there was nothing more that could be accomplished with the treatment at that time. (CX 11, p.13).

On September 10, 2002, Claimant was referred back to Dr. Shawa by Dr. Stokes, because Claimant's pain had worsened since he had last been seen by Dr. Shawa. Claimant was prescribed the *Catapress* patch to help plot the sympathetic nerves, as well as continuing on Neurontin. On examination, Dr. Shawa noted that Claimant's palm was dry, but his fingers were very sensitive, and he had not been trimming his fingernails because of the pain. Dr. Shawa noted that the color of the hands was similar and there was no edema. The range of motion was still restricted as to the left hand, however, it had significantly improved since the last time Dr. Shawa had seen Claimant. Dr. Shawa formed the opinion that Claimant suffered from left upper extremity regional pain syndrome and lateral epicondlyis. Consequently, Dr. Shawa chose to treat Claimant with oral medication which included Bextra and Phenergan.[11]

On October 10, 2002, Dr. Shawa reported that Avenza[12] was helping Claimant's left arm, however, when rating his pain Claimant stated it was a 9 out of a possible 10.

In January 2003, Claimant returned to Dr. Shawa (CX 11, p. 17). Claimant was prescribed the same medication at the same dosage amount. However, when Claimant returned to see Dr. Shawa in April 3, 2003, he told the doctor he felt he needed a higher dosage of Avenza. So Dr. Shawa doubled the original dosage from 30 mg/day to 60mg/day, as well as changing his dosage of Neurotin from 300 mg to 400 mg. Claimant reported his pain level as 8 out of 10.

[11] Bextra is a morphine preparation and Phenergan treats the nausea that may result.
[12] Avenza is another name for the morphine preparation medication.

Claimant returned to Dr. Shawa on July 8, 2003. Claimant reported his pain measured at 6 out of 10, but without the medication he reported the pain as 10 out of 10. It was at this point Claimant and Dr. Shawa began to discuss alternative procedures, namely a spinal cord stimulator.[13] Dr. Schawa explained that although it may not cure Claimant's problem, it might keep the pain controlled for a specific length of time. Furthermore, it would improve Claimant's function by relieving his pain. Claimant returned in September 2003 replying that he would like to try the stimulator. Dr. Shawa stated that Claimant needed a psychiatric evaluation before the procedure could proceed. Dr. Shawa specifically recommended Dr. Kevin Bianchini. Dr. Shawa added that at this time he noted that the medications (Avenza and Neurotin) were causing Claimant to be sleepy. So, he gave Claimant samples of Providual to act as a central nervous stimulant that would not affect heart rate or blood pressure (depo at 24).

Dr. Shawa added that although Claimant was not malingering, he did feel that Claimant lacked motivation due to depression (depo at p. 27). Dr. Shawa opined that chronic pain could lead to depression. Dr. Shawa also felt that a Functional Capacity Evaluation (FCE) would be most helpful after the spinal stimulator had been permanently implanted (CX 11 at 28). Dr. Shawa also felt that if Claimant were implanted with the spinal stimulator that he may see an improvement in his medical condition. Apparently because of the lack of objective findings concerning Claimant continued complaints of pain, Dr. Shawa recommended Claimant have a psychological evaluation before being implanted with a device, even on a trial basis. Absent the stimulator, Dr. Shawa felt that Claimant had reached MMI, however, if the stimulator could be implanted, he opined Claimant could possibly expect improvement (CX 11 at 29).

Dr. Shawa was deposed twice and his opinion changed during the time that elapsed between the two depositions. Dr. Shawa's deposition was initially taken in June 2003, and at that time Dr. Shawa opined that Claimant was capable of working. However, in July 2003, Claimant had become excessively somulent due to his medication and therefore, became unable to work. Consequently, when Dr. Shawa was deposed in November 2003, he opined that Claimant's state of alertness affected his ability to perform a job. Dr. Shawa agreed that if the somulence problem could be fixed with medication, then he would defer to Dr.

[13] A spinal cord stimulator is a device in which a lead is implanted into the spinal canal and that lead is connected to a generator that delivers a small current that interferes with the pain impulses that are sent from the brain. Typically, a trial is done first and if the trial is successful then the patient with have the generator and lead permanently implanted beneath the skin.

Stokes for a permanent impairment rating as to Claimant's hand injury (CX 11 at p. 53).[14]

Dr. Warren Bourgeois

Dr. Warren Bourgeois testified at the formal hearing as an expert in orthopedic surgery. When Claimant complained of back pain, Dr. Stokes referred him to Dr. Bourgeois. Dr. Bourgeois first saw Claimant on February 21, 2002. Dr. Bourgeois reflected a history in which Claimant described being lifted and twisted. Claimant reported a history of back problems and described the newest pain as coming from his right side, shoulder blade, as well as some lumbar region pain (TR 164). The physical exam revealed local tenderness without spasm in both right medial parascapular area and lower lumbar area. The x-rays were normal and there were no further actual positive findings (TR 165). Dr. Bourgeois surmised that Claimant's complaints were non-organic and, consequently, he diagnosed Claimant as suffering from lumbar and scapulothoracic strain with some possible symptom magnification as an overlay. Dr. Bourgeois felt that the pain was due to muscular/ligamentous strain and was therefore myofascial in nature. Initially, Dr. Bourgeois was unaware of Dr. Shawa's RSD diagnosis.

On July 1, 2002 Claimant returned to Dr. Bourgeois for treatment. They discussed the mechanism of injury because of the consistent complaints of back pain. On physical exam, Claimant's pain appeared to be in different localities, it had dropped from the right medial aspect to more of a flank area. Dr. Bourgeois noted that the back pain had arisen approximately 36 hours after the injury, and it was therefore possible that the pain medication and trauma injury distracted him from the concurrent back pain (TR 168). Five months following the accident, Dr. Bourgeois found no objective findings of a back injury.

On October 8, 2002, Claimant returned to Dr. Bourgeois complaining of pain. Once again, the physical exam revealed no objective findings and no explanation for the pain Claimant reported feeling (TR 171). Dr. Bourgeois ordered an MRI of the lumbar spine, giving Claimant the benefit of the doubt in spite of the lack of objective findings. On September 17, 2003, the MRI was found to be normal. Therefore, Dr. Bourgeois explained there was no basis on which to limit Claimant's longshoring activities.

Dr. Bourgeois clarified that there were never any objective findings as to Claimant's spine, however, there were non-organic symptoms throughout. The

[14] Claimant's somulence problem was remedied in November 2003..

complaints were migratory in nature in the thoracic spine and remained the same in the lumbar spine. A soft-tissue injury would have healed within 2-3 months. Claimant was unrestricted from returning to work *as to his spine*. Dr. Bourgeois had ordered an EMG for Claimant's upper left extremity, however, he felt that if Claimant was being treated for hand and arm pain then he would defer to those doctors for those injuries.

Dr Ralph Katz

Dr. Katz is an orthopedist who examined Claimant for injuries related to his back. Employer's Exhibit 8 is the related medical documents and Employer's Exhibit 13 is Dr. Katz's deposition. Dr. Katz examined Claimant once on March 6, 2002. Claimant described the accident in such a way that at the time of the accident he was on the ground, but Dr. Katz remarked that Claimant had no rotating or twisting which would cause a lower back injury. Claimant complained of back pain the Saturday morning following his accident, and was subsequently referred to Dr. Bourgeois. Claimant told Dr. Katz the central portion of the lower back was the source of his pain. It then radiated to the left thigh. He informed Dr. Katz that he had never had any prior *lower* back pain.

On physical examination, Claimant had no spasms or palpitation but complained of some mild tenderness in the lower back, mainly on the left side. X-rays of the lumbar spine were normal, and with respect to his thoracic spine he had no noted abnormalities. It was Dr. Katz's opinion that Claimant had a normal examination, and he did not see a cause and effect as to the mechanism of injury. He felt that the symptoms were probably attributed to his pre-existing lower back pain.

Dr. Katz's deposition served to clarify some portions of his report. Specifically, Dr. Katz reiterated that Claimant informed him that there had been no twisting or rotating during his accident (EX 13, p. 49). Dr. Katz noted that typically back pain sustained as a result of a traumatic occurrence will be felt immediately, whereas back pain sustained from a repetitive injury could manifest up to 24 hours later. There may be some difference depending on the degree of narcotic pain medicine; however, there will be some breakthrough pain unless the patient is sedated (EX 13, p. 19, 46). Claimant made no complaints of neck pain or reported any history of jerking his hand from between the barge and the ladder. Dr. Katz's assessment of Claimant's physical examination was normal (EX 13, p. 30). From Claimant's accident to his first experience of back pain on Saturday morning, there was a 30 hour lapse of time, which, when including Claimant ingestion of narcotic pain medication, could relate the two events, if there had been

a mechanism of injury sufficient to have caused a lower back injury, of which Dr. Katz found none.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals*, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg*. Co., 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc*., 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.,* 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on January 24, 2002, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured *his left hand* while working on the barge. Furthermore, neither party disputes the fact that the Reflex Sympathetic Dystrophy for which Claimant has been diagnosed and treated is also a result of the January 24, 2002 accident. The extent, duration and disabling effects of those injuries, however, are in issue.

Employer disputes Claimant allegations regarding the injury he alleges he sustained to his back. In order to invoke the presumption of causation Claimant must prove that he sustained an injury and there existed work conditions sufficient to have caused such an injury. In this case, Claimant stated that the event on January 24, 2002, resulted in him lying prone on the deck of the barge. However, when Dr. Katz specifically inquired as to the mechanism of injury when examining Claimant, Claimant denied having twisted or rotated his back during the January 24, 2002, accident (EX 13, p. 46-48). Therefore, according to Dr. Katz there was no consistent mechanism which could have caused the symptoms of which Claimant complained. Furthermore, Claimant was not found to have any objective orthopedic or neurological problem resulting from a traumatic injury in either his lumbar or thoracic spine. Neither Dr. Katz nor Dr. Bourgeois, both specialists who examined Claimant's back complaints, found Claimant to have any objective findings, and the subjective complaints were "migratory" according to Dr. Bourgeois, and unsubstantiated by physical findings according to Dr. Katz. The MRI taken in September 2002 was found to be normal (EX 11).

Concerning his alleged back injury, I find that Claimant has not presented sufficient evidence to invoke the presumption. Neither Dr. Bourgeois nor Dr. Katz identified an injury which Claimant could have sustained on January 24, 2002. Furthermore, neither doctor, even in light of extensive discussions regarding the mechanism of injury, felt that the incident of January 24, 2002, could have caused the pain Claimant described. Although much was made of the days which elapsed before Claimant was treated for his back complaints, I find that it made very little difference to these medical professionals. Even if Claimant did report the pain as early as 30 hours following the accident, Dr. Katz explained in his deposition testimony that traumatic back injuries will have pain that manifests immediately. Therefore, in spite of Claimant's opinion that his subjective back pain resulted from the incident aboard the barge, I find that there is not sufficient medical testimony to support his conclusion, and therefore, the §20(a) presumption has not

been invoked and the back complaints are found not related to the January 24, 2002, accident.

However, even if Claimant's testimony alone, or in combination with Dr. Bourgeois' initial diagnosis of back strain, had been sufficient to invoke the Section 20(a) presumption, I find that the above mentioned evidence is sufficiently ample to rebut the presumption, and in weighing the evidence as a whole I find Claimant has not borne his burden of proving causation. The x-rays taken by Dr. Bourgeois were normal and there were no further actual positive findings (TR 165). Dr. Bourgeois surmised that Claimant complaints were non-organic and consequently, he diagnosed Claimant as suffering from lumbar and scapulothoracic strain with some possible symptom magnification as an overlay. The failure to find any objective problems, as well as suspicions of symptom magnification, is extremely probative. It was Dr. Katz's opinion that Claimant had a normal examination, and he did not see a cause and effect as to the mechanism of injury. He felt that the symptoms were probably attributed to Claimant's pre-existing lower back pain. Therefore, since there is no medical opinion to support Claimant allegations regarding either his symptoms of back pain or the mechanism for a injury, I find that the clear weight of the evidence is against a finding that Claimant's back complaints were causally related to the January 24, 2002, incident on the barge.

Nature and Extent

Having established a hand injury and resultant RSD, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id*. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994);

Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Dr. Stokes opined, and Dr. Shawa agreed, that Claimant's conditions, both his crush injury and the resultant RSD, had reached maximum medical improvement on May 7, 2003. In Dr. Shawa's second deposition there was the problem of Claimant's excessive sleepiness as being secondary to the medication he was receiving for RSD requiring further treatment. However, absent that brief period of time when he was afflicted with the somulence, Claimant sleepiness, according to Dr. Shawa, had stabilized by November 2003, having gotten no worse or no better.

Although Dr. Shawa has suggested a spinal stimulator as a possible solution to Claimant's complaints of pain, I am unconvinced, based on Dr. Shawa's lack of objective findings, that it would materially improve Claimant's condition or offer a significant cure for Claimant's RSD.[15] There is no period of time which will elapse, even with the benefit of a spinal stimulator, wherein Claimant can expect to recover from RSD. Presently, according to Dr. Shawa, Claimant is capable of working, now that the somulence problem has been addressed, and therefore, I find that Claimant's RSD condition, as well as the hand injury, reached maximum medical improvement by May 7, 2003, the date identified by Dr. Stokes, and agreed to by Dr. Shawa.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date

[15] Dr. Shawa felt that if Claimant were implanted with the spinal stimulator that he *may* see an improvement in his pain level. Absent the stimulator, Dr. Shawa opined that Claimant had reached MMI, however, if the stimulator could be implanted then Claimant could possibly expect some pain relief. (CX 11 at 29). Dr. Shawa's comments offer hope for the procedure, however, the underlying condition of RSD will not materially change but rather the symptoms may lessen. The spinal stimulator would not fix the neurological problem, but rather would seek to lessen its manifestations, and is not, therefore, a reason to say Claimant's condition will materially improve upon its' implantation. Additionally, based on Dr. Shawa's lack of objective findings, Dr. Bourgeois' concerns of symptom magnification, and from observing Claimant's mannerisms in two days of trial, I question to what degree Claimant's complaints of pain are indeed valid.

on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co., 17 BRBS 64* (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

Employer agrees that Claimant was totally temporarily disabled from January 25, 2002, until August 12, 2002, when Claimant was offered a light duty position with Employer. On December 11, 2002, Employer admitted that the light duty program was suspended. Therefore, they agree that Claimant was again totally temporarily disabled from December 12, 2002, through May 7, 2003, the date Claimant reached maximum medical improvement. After May 7, 2003, Employer paid Claimant for his scheduled injury, a 40% permanent partial disability to Claimant's left hand. Then according to Dr. Shawa, Claimant was again briefly totally temporarily disabled from July 8, 2003 through November 28, 2003, due to a sleep condition.

Therefore, the dispute between the parties is whether the light duty position offered Claimant between August 12, 2002 and December 11, 2002, was suitable alternative employment such that he was only temporarily partially disabled through that time. The other dispute is whether Claimant is limited to his scheduled award for partial permanent disability or whether he is totally permanently or temporarily disabled because of either a continuing lack of suitable alternative employment or the failure to reach maximum medical improvement.

The Benefits Review Board has recognized light duty jobs offered within an employer's facility can be suitable alternative employment, despite claimant's' subsequent termination. *Brooks v. Newport News Shipping & Dry Dock Co.,* 26 BRBS 1 (1992) *aff'd. Brooks v. Director, OWCP*, 2 F.3d 64 (4th Cir. 1993); *Harrod v. Newport News Shipping & Dry Dock Co.*, 12 BRBS 10 (1980); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980), *vacated and remanded on other grounds*, 642 F.2d 445 (3rd Cir. 1981). In each of these cases, the light duty jobs offered were within the claimants' capabilities, and the terminations involved violations of company rules unrelated to the claimants' work-related disabilities. In other words, in order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it is within certain medical restrictions, and there is work within those restrictions available to him. *New*

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977).

The light duty job offered to Claimant in August 2002 is in contention between the parties. I find that based on the medical evidence, namely the opinions of the doctors, Claimant was capable of performing the light duty filing work that Employer had designated for Claimant, and furthermore he could have ridden the shuttle bus to his light duty position, in spite of his testimony. Claimant made much out of the fact that Employer did not accommodate him by allowing him to drive his own vehicle to his work site. However, I find that there were other means by which Claimant could have reached his work site if he had been diligently inclined. There was no indication from his doctors that Claimant was restricted from riding buses or vans, or that he was incapable of climbing into vehicles. I find that Claimant's self limitation was not an appropriate reason to refuse to work his light duty job, and the van ride in no way made that particular suitable employment unsuitable. Therefore, Claimant was temporarily partially disabled from the date the light duty position was offered, August 12, 2002, based on a wage earning capacity of $400 per week until the light duty program itself was suspended in December.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turne*r, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Where the employer withdraws its light duty job, as Employer here did on December 11, 2002, when the program was discontinued, the burden of establishing subsequent, suitable alternative employment remains with the employer. *Mendez, supra.* All witnesses agree that the program was suspended, whether it was permanently or temporarily, and consequently the position would no longer have been available and Claimant once again would have been in the position of being unable to return to his former employment, and the burden remained with Employer to identify suitable alternative employment.

Ms. Favaloro's report, dated May 9, 2002, two days following Claimant's reaching MMI, identified several jobs for which Claimant was both physically and vocationally qualified. Dr. Stokes had found that as of May 7, 2003, Claimant's left hand had a permanent impairment of 40%. Dr. Stokes also approved the jobs, identified by Ms. Favaloro, as ones Claimant was physically capable of performing. Ms. Favaloro's report took into account Claimant's age and

education, as well as his prior convictions, in finding employment. Mr. Ryan, a vocational expert hired by Claimant, agreed that Claimant was able to perform some of the jobs selected by Ms. Favaloro. Therefore, I find although Claimant returned to the status of TTD after the light duty program was suspended in December 2002, that as of May 7, 2003, Claimant became permanently partially disabled by virtue of having reached MMI and having been assigned a permanent impairment rating for his left hand.[16] Claimant was capable at that time, based on Ms Favaloro's testimony, of earning between $6.50 and $8.00 per hour.

Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2nd Cir 1991). Due to Claimant's permanent impairment to his hand, he is limited to the schedule for recovery. Under *Pepco v. Director, OWCP*, 101 S.Ct. 509 (1980), a claimant whose injury falls under the schedule and is capable of gainful employment is restricted to a schedule award. *See Brandt v. Avondale Shipyards, Inc*., 13 BRBS 357, BRB No. 79-125 (1981). Under the schedule, a hand lost is compensable by two hundred and forty-four weeks' compensation. Section 8(c)(3). Therefore, a 40 permanent impairment would equal 96 weeks of compensation.

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). While the record contains some evidence of job searches on Claimant's part, weighing the evidence as a whole I cannot find that Claimant conducted a diligent search. First, Claimant was persistent in testifying that he did not feel he was physically capable of working. I find that to be the most salient piece of evidence in Claimant's effort to make a diligent search. If Claimant indeed did not feel capable of working or was not motivated to work, then I find it extremely difficult to believe that his search for employment would in fact be diligent. Consequently, although Claimant testified he applied or inquired, on the basis of the record as a whole, I find that Claimant was not genuinely or diligently seeking employment, instead, he was attempting to create a record of *unsuccessfully* seeking employment. The claimant carries the burden on this issue, and I find that he has not shown that overall he conducted a diligent search.

[16] The permanent impairment rating included Claimant's RSD diagnosis in that Dr. Stokes made his determination following Dr. Shawa's diagnosis. Furthermore, Dr. Shawa did feel that Claimant was capable, even with his RSD, of working, and he did not assign any further impairment to Claimant's hand because of the RSD diagnosis.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv*., 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co*., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros.*, Inc., 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

Many of the medical treatments Claimant sought from Employer were provided after the formal hearing, or were the subject of post-hearing evidence and treatment. Following the post-hearing deposition of Dr. Shawa, Employer provided Claimant with the necessary medication to treat the excessive somnolence which had arisen from the combination and dosage of RSD prescription medications. Additionally, Claimant has requested, and been denied, a spinal stimulator for treatment of his RSD.

As discussed above, in regards to maximum medical improvement, I am unconvinced that a spinal stimulator is appropriate. Claimant is capable of working and has been release to work. Once Claimant's somulence problem was addressed, Claimant returned to maximum medical improvement, and the permanent impairment rating assigned by Dr. Stokes took into account the

limitation in motion due to pain. Dr. Bourgeois expressed concerns of symptom magnification, and in that the sole purpose of the spinal stimulator is to address subjective pain symptoms, I have concerns that unless the pain is in fact organic, that the requested stimulator will have any positive effect. Therefore, based on the speculation of Dr. Shawa as to the purpose and process of the spinal stimulator, as well as Claimant's current medical condition and the overlay of symptom magnification identified by Dr. Bourgeois, I find that Claimant's current course of treatment, absent the spinal stimulator, is sufficient, reasonable, and necessary.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp*., 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co*., 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.,* 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently

been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).[17]

Both parties agree that neither 10(a) nor 10(b) is applicable in this case. Therefore, in accord with the law, as well as the agreement of the parties, I will calculate Claimant's average weekly wage under 10(c). Unlike sections 10(a) and (b), section 10(c) does not condition the average weekly wage determination on the *actual* earnings of the employee or of other employees in the same class, but merely requires that the ALJ give regard to the employee's actual prior wages in the employment in which he was working at the time of injury. Thus, the amount actually earned by the employee at the time of the injury is a factor, but not the overriding concern under section 10(c) *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991). I must make a fair and accurate assessment of the

[17] Unlike Sections 910(a) and 910(b) of the Act, Section 910(c) allows the ALJ to consider more than just the year immediately preceding the injury. Compare 33 U.S.C. § 910(a), (b) with id. § 910(c). Nevertheless, the ALJ's task is to determine the "average weekly wage of the injured employee at the time of the injury ...." Id.§ 910. If the ALJ looks beyond the 52 weeks immediately preceding the injury, "he must take into account the earnings of all the years within that period." *Gatlin*, 936 F.2d at 823 (quoting *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981)) (emphasis omitted). In this case, there is no evidence that would allow me to skip over the claimant's earning history for the three years immediately preceding the accident and select his last full year of employment as his average annual earnings. There is not more than a scintilla of evidence in the record that there was a change in circumstances that made the claimant's average annual earnings at the time of injury greater than his actual earnings in the immediately preceding years, see, e.g., *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 754 (7th Cir.1979), or that claimant had recently changed his field of work. See, e.g., *Gatlin*, 936 F.2d at 821.

injured employee's earning capacity; the amount that the employee would have the potential and opportunity of earning absent the injury. *Tri-State Terminals v.Barber*, 596 F.2d at 757. The term "earning capacity" connotes the *potential* of the injured employee to earn and is not restricted to a determination based on previous actual earnings.

Claimant has offered nine different ways to calculate the average weekly wage, including several which employ the formula of 10(a) while using numbers derived from different years of earnings. Employer on the other hand suggested that Claimant's earning from the 29 weeks ($11,966.08) preceding his injury be divided by 29 for an average weekly wage of $412.62.

Considering all the above case law, as well as the arguments of the parties, I find that the most fair and reasonable determination of Claimant's potential earning capacity at the time of injury is determined by looking at 5 years of Claimant's past earning history as an indicator of his potential earning ability, as well as taking into account the financial health of the business at the port, and recognizing that Claimant's earning in 1998 would be inflated as that was the year that business at the port was at its peak. Taking into account the downward spiral of cargo tonnage on vessels, it would appear unfair to calculate Claimant's average weekly wage based solely on his last 52 weeks of earnings. By the same token it would unfair to add 2001 or 2002 royalty payments and vacation and holiday pay, when Claimant had not earned such benefits in the 3 years prior to his injury. However, Claimant status as an A-3 worker, when considering the potential increase in business promised by the cruise ships, would likely result in steady earning ability for Claimant, at a comparable rate to what he had been earning in the past.

The evidence proves that although there may not be a significant increase of port business and there may indeed have been some decrease, in the end, Claimant's ability to earn approximately the same annual salary remains unchanged. Therefore, considering the wages earned at the number of weeks worked, I find that Claimant's average weekly wage at the time of injury is more fairly calculated by adding the wages earned in previous years and dividing that by the number of weeks worked, resulting in an average weekly wage of $628.83.[18] This calculation includes the year Claimant worked a full 52 weeks, as well as the

[18] In 1998 Claimant worked 52 weeks and earned $34, 106.97. In 1999 Claimant earned $18, 161.32 and worked 21 weeks (CX 1b, p.9). In 2000 Claimant worked 6 weeks and earned $1, 639.35. In 2001 Claimant earned $10,935.83 for 24 weeks of work and in 2002 Claimant earned $1, 812.25 for 3 weeks of work. The total wages earned w\between 1998 and 2002 were $66,655.75 and the number of weeks worked was 106, therefore the average weekly wage would be $628.83

following years in which Claimant was injured or the business at the Port was not as substantial, providing for a fair and reasonable calculation of Claimant wage earning potential at the time of the January 24, 2002, injury.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on January 25, 2002, 1 day after injury. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from January 25, 2002 until August 12, 2002 , the date of suitable alternative employment, based on an average weekly wage of $628.83;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from August 12, 2002, until December 11, 2002, based on the difference between wage earning capacity of $400.00 and an average weekly wage of $628.83;

(3) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from December 11, 2002, until May 7, 2003, date of maximum medical improvement, based on an average weekly wage of $628.83;

(4) Employer/Carrier shall also pay to Claimant compensation for temporary total disability benefits from July 8, 2003 until November 28, 2003 (the period during which Claimant suffered with somulence), based on an average weekly wage of $628.83;

(5) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits based on an average weekly wage of $628.83 for a 40% impairment of his left hand, commencing May 7, 2003, for a period of 96 weeks;

(6) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of January 24, 2002;

(7) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(8) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co*., 16 BRBS 267 (1984);

(9) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(10) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 23rd day of March, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam